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Nexus Program Director's Update on Significant Nexus Law Developments Since March 9, 2017

State Legislation

Alabama

The Alabama Legislature enacted SB 86, which became effective July 1, 2017, amending section 40-2-11(7), Code of Alabama, to authorize the Department of Revenue to require non-collecting remote retailers to report sales to the Department and provide notice to consumers of their use tax obligations, within constitutional limits. SB 86 authorizes publication of list of remote retailers participating in Simplified Sellers Use Tax Remittance Program—116 registered, collected \$39.1 million in first 9 months of fiscal year ending June 30, 2017. Chris Marr, "Amazon, IDEA on List of Online Sellers Paying Alabama Tax," Bloomberg BNA Daily Tax Report (7/11/17).

Arkansas

The Arkansas Senate passed favorably SB 140, which contained anti-Quill provisions similar to South Dakota's SB 106, but the bill failed in the House. Lauren Loricchio, "Arkansas House Rejects Bill to Challenge Quill," Tax Analysts State Tax Today, (4/4/17).

California

An analysis done for the California Nurses Association, to be presented to the California Legislature, is considering a gross receipts tax, or alternatively a payroll tax or sales tax rate increase, to fund single payer insurance in California. Paul Jones, "Analysis Proposes Sales, Gross Receipts Taxes to Fund California single-Payer Bill," State Tax Notes, (6/7/17).

Connecticut

Connecticut Legislature ended its session June 8, 2017 without taking action on several pending tax bills. Aaron Nicodemus, "Connecticut Lawmakers Defer Action on Most Tax Policy Bills," Bloomberg BNA Daily Tax Report, (6/9/17).

Georgia

House and Senate disagree on tax plans, Senate passing anti-*Quill* legislation and the House rejecting it on March 28, 2017. "Georgia Senate Scraps House Flat Income Tax Plan, Adds Quill Challenge to Bill," State Tax Notes, (3/29/17).

Hawaii

Hawaii House passed HB 620 on April 11, 2017 providing for notice and reporting requirements for remote sellers for Hawaii's general excise tax (GET), and also including provisions requirement remote sellers with a server present in Hawaii and using it for economic gain to collect the GET if their sales to Hawaii are above a certain threshold (not yet specified).

Indiana

Indiana has enacted HB 1129, effective July 1, 2017, similar to South Dakota's law challenging Quill, requiring remote retailers with annual sales into the state exceeding \$100,000 or with 200 or more transactions in the state in a year, to collect and remit Indiana sales/use tax on remote sales. The law does not become enforceable until the Department of Revenue initiates a declaratory judgment action and obtains an order that the law is constitutional (i.e., Quill is overturned). A lawsuit challenging the constitutionality of HB 1129 was filed on June 30, 2017. See Cases.

Kansas

In March 2017, the Kansas House Tax Committee passed out favorably HB 2400, which included anti-Quill provisions similar to South Dakota's SB 106, and HB 2235, which included notice and reporting requirements for remote sellers similar to Colorado's, but neither bill advanced further during the regular session.

Louisiana

The Louisiana Legislature introduced a bill (supported by Governor Edwards) (HB 628 on April 17, 2017) providing for a gross receipts tax similar to the Ohio commercial activities tax (CAT).

Maine

L.D. 1405 was enacted after override of Governor LePage's veto, providing for anti-*Quill* legislation similar to South Dakota's, requiring remote retailers with over \$100,000/yr in sales to Maine or over 200 transactions/yr. to commence collecting and reporting Maine use tax, effective 10/1/17, and authoring the Department of Revenue to seek a declaratory judgment as to the act's constitutionality. The legislation provides for injunction against enforcement during the declaratory

judgment litigation and if the injunction is lifted, prospective enforcement. Paige Jones, "Maine Remote Sales Tax Law to Take Effect October," *Tax Analysts State Tax Today*, (6/26/17).

Minnesota

Minnesota has enacted H.F. 1, an omnibus tax bill, which includes provisions effective January 1, 2019 (or earlier if the Supreme Court or Congress allows states to collect from remote retailers) requiring a marketplace provider with nexus to collect sales/use tax on behalf of third-party sellers using the marketplace to facilitate sales, unless the third-party seller is registered to collect. Third-party sellers are not required to register if they otherwise do not have nexus and their remote sales to Minnesota do not exceed \$10,000 in the prior year. Affiliate nexus provisions are also included. Minnesota is the first state to enact marketplace provider collection legislation. Commentators expect the new law to be challenged. Michael Bologna, *Bloomberg BNA Daily Tax Report*, "Minnesota Marketplace Law Ripe for Legal Challenge," (6/3/17).

Nebraska

LB 44, similar to Colorado's notice and reporting legislation, was introduced in the Nebraska Unicameral Legislature but was allowed to die before a final vote on May 4, 2017, when it became clear to the sponsor that there were insufficient votes for passage. The bill required remote retailers with over \$100,000 in sales/200 transactions in prior year to Nebraska to collect use tax, or alternatively, comply with notice and reporting requirements. Maria Koklanaris, "Sponsor Allows Nebraska Remote Sales Tax Bill to Die Before Final Vote," *Tax Analysts State Tax Notes*, (5/8/17).

New Jersey

New Jersey Legislature has sent to the governor A. 4587, S.2574 imposing hotel taxes on bookings by Airbnb, Inc. and other similar platforms, imposing the tax collection and remittance obligation on the platform. John Herzfeld, "New Jersey Bill taxing Airbnb Bookings Sent to Governor," *Bloomberg BNA Daily Tax Report*, (6/21/17).

New Mexico

The New Mexico Legislature passed H.B. 2 on May 25, 2017, which required remote retailers with over \$100,000 in retail sales to New Mexico in the prior year to collect and remit New Mexico gross receipts tax, effective July 1, 2017. The law also would require marketplace providers, such as Amazon.com, to collect tax on behalf of third-party sellers using the marketplace. "New Mexico Lawmakers Approve Gross

Receipts Tax on Large Remote Retailers,” Andrea Muse, Tax Analysts State Tax Notes, (5/26/17). Governor Susana Martinez vetoed these provisions on June 1, 2017. CCH State Tax Day.

New York

Governor Cuomo’s proposal to require marketplace providers in New York to collect sales/use tax on behalf of third-party sellers did not advance, prior to the end of the state legislative session. Jennifer McLoughlin, Bloomberg BNA Daily Tax Report, “States Refresh, Reload on Marketplace provider Taxes,” (4/24/17).

North Carolina

The Senate approved 2017 SB 81, requiring remote retailers with North Carolina sales over \$100,000/yr. or over 200 North Carolina transactions/yr. to collect and remit sales/use tax. The definition of “retailer” was amended to include marketplace facilitators. Annual reporting requirements are imposed on marketplace facilitators for short-term residential rentals, requiring the facilitator to disclose property owners’ identity. Marketplace facilitator provisions, similar to Minnesota’s requiring the marketplace facilitator to collect and remit on behalf of third-party sellers effective July 1, 2019, were also added. Andrew Ballard, Bloomberg BNA Daily Tax Report, “Online Marketplace Tax Bill Advances in North Carolina,” (6/9/17). However, the bill died in a House committee on June 30, 2017 when the legislative session ended. Lauren Lorrichio, “North Carolina Online Tax Bill Dies in House Committee,” Tax Analysts State Tax Today (6/30/17). There is a remote possibility that the issue could come up during the veto session, which begins August 3. Andrew Ballard, “Online Sales Tax Effort Crashes in North Carolina,” Bloomberg BNA Daily Tax Report, (7/5/17).

North Dakota

North Dakota has enacted H 2298, anti-*Quill* legislation similar to South Dakota’s, but its effective date is contingent on *Quill* being overturned. Jennifer McLoughlin, Bloomberg BNA Daily Tax Report, “Digital Sales Tax: Hit and Miss in States,” (4/7/17).

Ohio

Ohio enacted its budget legislation, HB 49, containing provisions creating a rebuttable presumption of “substantial nexus” for purposes of collecting sales/use tax when the remote seller has sales to Ohio customers exceeding \$500,000/yr. and either: (a) uses in-state computer software to sell or lease tangible personal property or services to Ohio consumers; or (b) enters into an agreement with an in-state content distribution

network service provider to accelerate or enhance delivery of the seller's website to Ohio consumers. "Ohio Budget Bill Eliminates Tax Brackets, Expands Nexus Provisions (H.B. 49)" Tax Analysts State Tax Today (6/30/17).

Oklahoma

Oklahoma has enacted the Out-of-State Tax Collections Enforcement Act of 2017, HB 1427, to establish a new enforcement division and hire private auditors to work on collecting tax owed by out-of-state taxpayers.

Oklahoma has enacted HB 2252, effective November 1, 2017, modifying its procedures for voluntary disclosure agreements to allow 50% waiver of interest, along with waiver of penalties.

Oregon

Oregon has adopted in HB 2275 the MTC model statute definition of "apportionable income," replacing its definition of "business income," effective for tax years beginning on or after January 1, 2018.

The Oregon Legislature enacted on July 3, 2017 SB 28 (amending O.R.S. sections 314.605 through 314.675) to replace the cost of performance standard with a market-based sourcing standard for purposes of determining the sales factor applicable to intangible property and service, as used in the corporate excise (income) tax apportionment calculation. The change would apply to tax years beginning on or after January 1, 2018. "Oregon Legislature Changes Apportionment Method of Corporate Income from Intangibles, Services," Bloomberg BNA Daily Tax Report, (7/6/17).

Oregon Democrats have dropped a plan to pursue a gross receipts tax this legislative session. Paul Shukovsky, "Oregon Democrats Drop Plan to Pass Gross Receipts Tax," Bloomberg BNA Daily Tax Report, 6/26/17.

Pennsylvania

Pennsylvania House passed HB 542 on May 9, 2017, which would require remote sellers with \$500 or more of sales to the state in prior year to notify their customers that sales/use tax is due on their purchases. Senate finance committee passed the bill out favorably on June 26, 2017. Leslie Pappas, "Online Sales Tax Notice Bill Clears Pennsylvania Committee," Bloomberg BNA Daily Tax Report, (6/27/17).

Rhode Island

The Rhode Island House passed H.5175A on 6/22/17, imposing a requirement on remote retailers with over \$100,000 in sales to Rhode Island or over 200 transactions

in prior year to collect use tax, or opt to comply with notice and reporting requirements. This provision has been included in the budget bill. The Senate has also approved this provision, but added an amendment dealing with another tax issue to the budget bill, and the House did not vote on that change before the session ended. The Legislature is recessed for the summer. Adrienne Appel, "Online Sales Tax Stalled in Rhode Island Budget Stalemate," Bloomberg BNA Daily Tax Report (7/5/17).

Texas

SB 1713, providing for a sales tax compliance study to be completed by the Texas comptroller, died in House Committee at the end of the Texas legislative session on May 29, 2017. It also included notice and reporting requirements and a requirement for a marketplace provider to collect tax. Originally, the bill contained anti-*Quill* provisions. Lauren Loricchio, "Texas Bill Requiring Sales Tax Compliance Study Dies," State Tax Notes, (5/31/17); Paul Stinson, Bloomberg BNA Daily Tax Report, "Texas Online Sales Tax Study Times Out," (6/1/17).

Vermont

The Vermont Legislature enacted HB 516 providing that effective July 1, 2017, on or before January 31 of each year, noncollecting vendors must file with the Department of Taxes a copy of the notice they will be required to provide to certain purchasers indicating that sales or use tax is due on nonexempt purchases that the purchasers made from the vendor and that Vermont requires the purchaser to file a sales or use tax return. This additional requirement applies only to noncollecting vendors who made \$100,000 or more of sales into Vermont in the previous calendar year. A noncollecting vendor who fails to file a copy of the notice with the department is subject to a \$10 penalty for each failure, unless the noncollecting vendor shows reasonable cause.

The 2016 law that imposed the requirement of notifying purchasers is scheduled to take effect on the earlier of July 1, 2017, or beginning on the first day of the first quarter after the sales and use tax reporting requirements challenged in *Direct Marketing Assoc. v. Brohl*, 814 F.3d 1129 (10th Cir. 2016), are implemented by the state of Colorado.

Virginia

Virginia enacted SB 1528 on March 24, 2017 to provide for local government regulation of Airbnb and other short-term residential rental platforms. Airbnb had

lobbied for state-wide regulation. The concern with that approach was that the identities of vendors would be shielded from local governments, making regulation more difficult. Andrew Ballard, Bloomberg BNA Daily Tax Report, "Virginia Lets Localities Regulate Short-term Rentals," (3/30/17).

Virginia Legislature enacted HB 2058 and SB 962, providing that effective June 1, 2017, a dealer owning inventory located in a Virginia warehouse or fulfillment center creates nexus and the duty to register as a retailer to collect Virginia sales/use tax.

Washington

Two bills were introduced in the Washington Senate on March 15, 2017, SB 5855 and 5856, providing for notice and reporting requirements similar to Colorado's, and in addition, anti-*Quill* provisions similar to South Dakota's, applicable to Washington sales/use tax. It also extends factor presence nexus to the B&O tax on retailers (\$267,000 of annual Washington sales). On June 30, 2017, the Legislature approved HB 2163, which is effective January 1, 2018 and requires remote sellers (making sales sourced to Washington over \$10,000/yr.), marketplace facilitators (facilitating sales to sourced to Washington over \$10,000/yr), and referrers (deriving gross receipts from referred sales sourced to Washington over \$267,000/yr.) to either commence collecting and remitting use tax or comply with notice and reporting obligations. Remote retailers will also become subject to the Washington's factor presence nexus standard for B&O tax. The governor signed this legislation on July 7, 2017. NetChoice has indicated it intends to challenge HB 2163 as imposing an unconstitutional burden on e-commerce sellers and violating ITFA by discriminating against e-commerce sellers. Paul Jones, "Litigation Likely for Washington Law Making Marketplace to Collect Sales Taxes," Tax Analysts State Tax Today, (7/10/2017).

Wisconsin

Wisconsin legislature introduced SB 259 on May 17, 2017 requiring remote retailers with over \$50,000 in retail sales to Wisconsin in prior year to provide notices to customers by January 31 an itemized list of their purchases and that they are required to pay Wisconsin use tax on their purchases. Alternatively, the remote retailer can voluntarily collect the tax or provide notice to the department of the name and address of the purchaser and amount of the purchase.

Wyoming

Wyoming Legislature enacted HB 19, effective July 1, 2017, requiring remote sellers with Wyoming sales exceeding \$100,000 or 200 separate transactions per year to begin

collecting and remitting use tax. Department can bring declaratory judgment action to test constitutionality. See "Certain Remote Sellers Must Remit Tax on Sales Delivered Into Wyoming," CCH Tracker News (3/3/17).

A Wyoming legislative panel is considering a proposal for a gross receipts tax at the rate of .26%. Paul Jones, Tax Analysts State Tax Notes, "Wyoming Lawmakers Considering Gross Receipts Tax," (6/5/17).

Rulings

Colorado

The Colorado Department of Revenue is in the process of reviewing and revising its rules for implementing the notice and reporting requirements on remote sellers, which went effect on July 1, 2017 pursuant to the settlement agreement in the *DMA v. Brohl* litigation. Amy Hamilton, "Colorado DOR Reviews Use Tax Notice and Reporting Rules Before July 1 Enforcement," State Tax Notes, (5/15/17). Colorado Department of Revenue announced June 16 that it would be releasing an emergency rule effective July 1, 2017 to implement the notice and reporting requirements imposed on remote sellers. Tripp Baltz, "Colorado Releases Tax Reporting Rule for Remote Sellers," Bloomberg BNA Daily Tax Report 6/19/17. Colorado Department of Revenue has published Draft Rule 39-21-112(3.5) as the emergency rule. Amy Hamilton, "Colorado DOR to Adopt Emergency Rule on Use Tax Notice Requirements," Tax Analysts State Tax Notes, (6/26/17).

Connecticut

Notice 2017(1), Connecticut Department of Revenue Services, dated April 17, 2017, provides that effective for tax years beginning on or after January 1, 2016, Connecticut has adopted single sales factor apportionment and market-based sourcing of services and intangibles income for its corporation business tax.

Connecticut Department of Revenue Services sent demand letters to 233 remote retailers in June 2017 requesting either sales data for prior 3 years or that the remote retailer begin registration and collection prospectively. Some remote retailers have responded with registration or the sales data. Aaron Nicodemus, "Connecticut Digging for Sales Data from Remote Retailers," Bloomberg BNA Daily Tax Report (7/13/17).

Massachusetts

Massachusetts Department of Revenue published its Directive 17-1 on April 3, 2017, providing that effective July 1, 2017, remote retailers with over \$500,000 in Massachusetts sales or over 100 transactions in Massachusetts in prior year are required to register and collect Massachusetts sales/use tax, based on nexus through cookies or other software placed on Massachusetts' customers' computers or smartphones, and use of content distribution networks or marketplace providers located in the state. The Directive takes the position that this amounts to "physical presence nexus" consistent with *Quill*. On June 7, 2017, NetChoice initiated litigation challenging the constitutionality of Directive 17-1 and arguing that it violates the Internet Tax Freedom Act. See Paige Jones, "NetChoice to Challenge Massachusetts Remote Sales Tax Collection Directive in court," State Tax Notes, (6/6/17). Massachusetts district court determined that Massachusetts Department of Revenue did not comply with the APA in promulgating Directive 17-1, so the Directive has been withdrawn, and the Massachusetts Department of Revenue is proceeding with the formal rule-making process to re-promulgate Directive 17-1 as a regulation. Projected revenue from Directive 17-1 was included in the Massachusetts FY 18 budget. Addrienne Appel, Bloomberg BNA, "Massachusetts Lawmakers Approve Online Seller Tax in Budget," (7/11/17).

Michigan

Michigan Treasury and Airbnb have entered into an agreement for Airbnb to commence collecting hotel taxes on Airbnb bookings effective July 1, 2017. Alex Ebert, "Airbnb Closes Tax Deal with Michigan, Now Collects in 30 States," Bloomberg BNA Daily Tax Report, 6/12/17.

New Mexico

In the matter of Aventis Pharmaceuticals, Inc., New Mexico Taxation and Revenue Department No. 17-23, May 19, 2017 (reprinted from CCH)

Corporate members of an out-of-state limited liability company (LLC) that solicited sales in New Mexico were liable for New Mexico corporate income tax on income earned by the LLC because the New Mexico activities were not limited to sales solicitation, and the corporate members had sufficient nexus with Mexico due to those other New Mexico activities and to the activities of a related corporate entity. The LLC's income was attributed to its two corporate members because the members served as flow-through entities in a corporate organization owned by a foreign pharmaceutical company. Federal law prohibits state taxation when a taxpayer is engaged in the mere solicitation of sales and de minimis activities in the state. Taxation is permissible when nexus exists between the taxpayer's activities and the state. In New Mexico, nexus exists when the activities performed in New Mexico by

or on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in New Mexico. In addition to soliciting orders from doctors, hospitals, and pharmacies, the LLC provided ongoing educational opportunities, textbooks, and training to doctor's offices and collaborated with hospitals in treatment protocols. These activities were more than de minimis because they were not merely ancillary to pharmaceutical product sales. The pharmaceutical company's North American headquarters had intercompany agreements with the LLC, under which the headquarters provided management and back office services. The headquarters also entered into a clinical research agreement with a New Mexico hospital and doctor that required any legal notice be sent to the LLC. The doctor did not distinguish between the headquarters and the LLC, thinking he worked for one company, the pharmaceutical company. Like the LLC's additional activities, the headquarters' activities in New Mexico also were not ancillary to product sales. Thus, state taxation was not prohibited. Furthermore, the activities of the LLC and the headquarters established nexus between the LLC's members and New Mexico because those activities increased the LLC's market in New Mexico.

Pennsylvania

Pennsylvania Department of Revenue has entered into an agreement with Wayfair, Inc., a larger internet retailer, for Wayfair to commence collecting Pennsylvania sales/use taxes on its remote sales to Pennsylvania commencing May 1, 2017.

Tennessee

In Revenue Ruling # 17-08 (6/21/17), the Tennessee Department of Revenue determined that an interstate motor carrier making trips originating in Tennessee and ending in other states, originating in other states and ending in Tennessee, and originating and ending in Tennessee, but with no offices, property or personnel permanently in the state, nonetheless had "substantial nexus" with the state for purposes of its franchise excise tax. Trips traveling through Tennessee would not establish nexus. Tennessee has adopted "factor presence nexus" standard (\$500,000 in receipts, \$25,000 in property or salaries, 25% property, receipts or salaries) and also extends nexus to the fullest reach of the U.S. Constitution. Tennessee has a special apportionment formula for trucking companies, based on mileage in the state.

Utah

Private letter ruling 16-003, Utah Tax Commission (3/31/17). Internet marketplace provider did not fit within statutory definition of "seller" or "retailer" so was not required to register and collect sales tax on online sales taking place on marketplace platform between third party sellers and customers.

Washington

Determination No. 16-0296, Washington Dept. of Revenue (4/28/17). An out-of-state sporting product distributor was held subject to B&O wholesale tax on sales to Washington retailers, based on out-of-state sales representatives making customer visits to Washington 3 times per year, each visit lasting 2 to 6 days.

Determination No. 16-0342, Washington Dept. of Revenue (6/7/17). Out of state manufacturer of natural ingredients and botanical extracts was subject to Washington wholesaler's B&O tax on gross receipts, due to economic factor presence nexus threshold of over \$250,000 in Washington sales, effective 9/1/15. Had substantial nexus prior to that, due to sales representative making annual visits in the state to solicit sales.

Determination No. 15-0321, Washington Dept. of Revenue (11/19/15 decision published 6/30/17). An out-of-state online retailer of brand name apparel and accessories (and its successor) appealed assessments of retailing business and occupation (B&O) and retail sales tax, asserting that the Washington activities of its wholesaling affiliate are insufficient to establish taxable nexus. Held: A wholesaling affiliate's promotion to third-party retailers of the same brand name products sold by an online retailer affiliate, wholesale product packaging containing the online retailer affiliate's website, and the existence of a retail "store locator" on the online retailer affiliate's website, are insufficient activities to create taxable nexus for the online retailer.

Wisconsin

Wisconsin has entered into a collection agreement with Airbnb effective July 1, 2017. Paul Jones, "Airbnb Agrees to Collect Taxes in Michigan, Wisconsin," Tax Analysts State Tax Notes, (6/12/17).

Cases

Alabama

Scholastic Books Inc. v. Alabama, No. 14-374, (March 25, 2017).

The Alabama Tax Tribunal upheld the Department's use tax assessment, determining that Scholastic Books had representational nexus in Alabama through the school teachers that accepted orders and payments on behalf of Scholastic Books.

Newegg, et al v. Alabama Department of Revenue, Alabama Tax Tribunal, challenge to assessment under anti-Quill regulation requiring remote sellers with over \$250,000 in sales/yr. to Alabama to collect use tax, pending in discovery.

Connecticut

The U.S. Supreme Court denied certiorari in *Allen v. Comm'r of Revenue Services*, in which the Connecticut Supreme Court held that nonqualified stock options granted for services performed in Connecticut were subject to Connecticut's income tax when the options were exercised, even if the taxpayer no longer resided in the state. Andrea Muse, Tax Analysts State Tax Notes,"U.S. Supreme Court Won't Hear Connecticut Stock Options Case," (6/6/17).

Indiana

NetChoice and American Catalog Mailers Association have filed suit on June 30, 2017 in Indiana seeking a declaratory judgement that Indiana Act No. 1129 (which was to go into effect on July 1, 2017), anti-*Quill* legislation similar to South Dakota's, be declared unconstitutional, and that it be enjoined from enforcement.

Minnesota

In *Fielding v. Commissioner of Revenue*, Minnesota Tax Court, Nos. 8911-R, 8912-R, 8913-R, and 8914-R (5/31/2017), the Tax Court held that the Commissioner erroneously denied income tax refund claims of resident trusts, in that Minnesota lacked sufficient connection to the gain income from sales of intangibles not located in Minnesota, in violation of due process, even though personal jurisdiction over the trusts existed. The fact that the grantor's domicile was in Minnesota at the time the trusts became irrevocable was insufficient connection when the domicile of the trusts was outside of Minnesota. The state may only tax income from in-state sources. Minnesota statute defined residency of a trust based on the domicile of the grantor of an intervivos trust at the time the trust became irrevocable (which was Minnesota). The trustee, beneficiaries (except for one), and trust intangibles assets were located outside of Minnesota for tax years of the refund claims. The Tax Court acknowledged personal jurisdiction as to the trusts, but found lack of subject matter jurisdiction as to the income, in violation of due process. The trusts held shares of an S corp that did business in and generated income in Minnesota. When the trusts sold their interests in the S corp, generating gain income, the court found a lack of nexus as to that income.

New Jersey

By order dated April 10, 2017, the New Jersey Tax Court affirmed the Division of Taxation's income tax assessment against Xylem Dewatering Solutions, Inc.,

determining that the gain income \$308 million from a New Jersey S Corporation deemed asset sale under IRC Section 338(h)(10) of non-resident shareholders was sourced to New Jersey. The income was considered “non-operational” and therefore sourced 100% to New Jersey. David Silverman, Bloomberg BNA Daily Tax Report, “New Jersey Tax Court Rules Against S Corp Shareholder,” (4/12/17).

In *Elan Pharmaceutical Inc. v. New Jersey Div. of Tax*, No. 010589-2010 (N.J. Tax Ct 2017), the court held that because New Jersey has an economic nexus standard for its corporate income tax, New Jersey could not use its “throwout rule” unless the taxpayer was not taxable in the other state, due to P.L. 86-272 or it would be unconstitutional. Just because the other state chooses not to tax that income is insufficient to apply the throwout rule. Some practitioners point out that this presents a significant planning opportunity for in-state companies to reduce their corporate income tax liabilities in states that apply an economic nexus standard, because that same standard must be applied in determining the other states where the taxpayer is not subject to tax, for purposes of a throwout rule. Alan V. Lindquist, Tax Analysts State Tax Notes, “The Elan Case: Economic Nexus as a Tax Planning Opportunity,” (6/5/17).

Ohio

The parties have settled in *Crutchfield Corp. v. Testa*, so no petition for certiorari was filed with the U.S. Supreme Court. Jennifer McLoughlin, Bloomberg BNA Daily Tax Report, “U.S. Supreme Court Won't Get Look at Ohio Receipts Tax,” (4/17/17).

Oregon

Cheng Shin Rubber USA, Inc. v. Dept of Revenue, TC-MD 156268D Oregon Tax Court (3/31/17) Out of state tire seller with no physical presence in Oregon sold tires to its authorized tire dealer/distributor, Les Schwab in Oregon. Cheng Shin Rubber provided a limited warranty on its tires, replacing defective tires if the original purchaser bought the tire from its authorized dealer/distributor and returned it to the authorized dealer/distributor. Les Schwab also provided a more extensive tire warranty, including free tire rotation, balancing, tire checks. If a customer returned a defective tire to Les Schwab, the dealer would issue a refund or credit and in turn submit a warranty claim to Cheng Shin, which would either send a replacement tire or provide a credit. Oregon audited Cheng Shin and assessed them for corporate excise tax. Cheng Shin claimed immunity under P.L. 86-272. The court upheld the assessment, determined that Cheng Shin engaged in non-solicitation activities in Oregon through its independent contractor/warranty service provider, Les Schwab, relying on Ann Sacks as precedent. Some commentators view the decision as an

overly aggressive attempt by Oregon to limit the protections of P.L. 86-272. See Che Odom, Bloomberg BNA Daily Tax Report, "States are Looking to Avoid Federal Limits on Income Taxes," (5/1/17).

South Dakota

In *Wayfair, Inc. v. South Dakota*, the state circuit court's March 6, 2017 ruling that SB 106 (South Dakota's anti-Quill legislation) is unconstitutional is now on appeal to the South Dakota Supreme Court. The court is also expected to rule that the law is unconstitutional, so that a petition for certiorari may be filed with the U.S. Supreme Court, possibly by the end of this year, raising the possibility for *Quill* to be overturned. The parties have completed briefing before the South Dakota Supreme Court and are awaiting a ruling.

Tennessee

On March 30, 2017, NetChoice and American Catalog Mailers Association challenged in Tennessee chancery court the constitutionality of Tennessee's Rule 129, which would require remote retailers with Tennessee sales exceeding \$500,000 to commence collection of Tennessee sales/use tax starting July 1, 2017. The parties have agreed that Rule 129 will not be enforceable during the pending of the litigation. The Tennessee Assembly has passed legislation, HB 261 on 5/9/17, requiring that the legislature must review and approve of the court determination before Rule 129 can become enforceable.

Virginia

Ruling of Commissioner, P.D. 17-71, Virginia Department of Taxation, May 23, 2017 (reprinted from CCH). The Virginia Tax Commissioner ruled that an on-line business located outside Virginia has sufficient nexus with Virginia to require it to register for the collection and remittance of the Virginia retail sales and use tax. The taxpayer represents that it maintains no employees, offices, business locations, or warehouses in Virginia. The only presence the taxpayer has in Virginia is the storage of resale inventory in a fulfillment center located in Virginia. During its 2017 session, the Virginia General Assembly passed legislation (Ch. 51 (H.B. 2058) and Ch. 808 (S.B. 962)) to amend Va. Code §58.1-612(C), which sets forth those activities that a dealer may be engaged in that establish nexus with Virginia and require the dealer to register for the collection of the Virginia retail sales and use tax. Subsection 9 of that statute was amended to provide a dealer will have sufficient activity to require registration if such dealer: "Owns tangible personal property that is for sale located in this Commonwealth, or that is rented or leased to a consumer in this Commonwealth, or

offers tangible personal property, on approval, to consumers in this Commonwealth." The amendment was effective June 1, 2017.

Wyoming

Two lawsuits are pending in state district court concerning HB 19, Wyoming's anti-*Quill* legislation: *Wyoming v. Newegg, Inc.*, No. 34238 (7/7/17) (filed by AG seeking declaratory judgment that HB 19 is constitutional) and *Am. Catalog Mailers Ass'n v. Noble*, No. 188-137 (6/28/17) (seeking determination that HB 19 is unconstitutional). Michael Bologna, "Wyoming Boots Up Online Sales Tax Lawsuit, Joins Four Others," Bloomberg BNA Daily Tax Report (7/11/17).

Amnesty

Pennsylvania

Pennsylvania's tax amnesty program closed as of June 19, 2017.

Streamlined Sales Tax

At its May 11, 2017 meeting in Bismarck, North Dakota, the Governing Board of the Streamlined Sales and Use Tax Agreement approved a new "disclosed practice" concerning the states' policies regarding voluntary disclosure agreements and how the timing of a seller's registration through the SST centralized registration system with the member state (which would be considered a contact with the state) will affect a voluntary disclosure agreement (VDA). States will indicate whether registration would make the seller ineligible for voluntary disclosure relief if it occurs before either the state or the seller, or both, have signed the VDA. States are encouraged to allow sellers to register early in the voluntary disclosure process, prior to signature by all parties, so that sellers can commence collecting and remitting sales/use tax sooner and minimize their back tax liabilities. The disclosed practice will become part of the state's published taxability matrix.

Multistate Tax Commission Uniformity Committee

Following denial of the petition for certiorari in *DMA v. Brohl*, MTC Uniformity Committee Model Sales and Use Tax Reporting Statute Project is back underway, updating a prior proposal based on the Colorado notice and reporting statute. The workgroup on this project is addressing the issue of whether the party obligated to provide notice to the remote seller's customers and file an annual report with the state revenue department should be broadened to include a marketplace provider. Tripp Baltz, Bloomberg BNA, "Multistate Group Mulls Marketplace Obligations," (5/26/17).

Congress

S. 276, the Marketplace Fairness Act of 2017, and H.R. 2193, the Remote Transactions Parity Act of 2017, have been introduced April 27, 2017 in the 115th Congress. These are similar to the bills introduced in prior years, providing Congressional authorization for states to require certain remote sellers to collect use tax on remote sales, when certain conditions are met.

Representative Sensenbrenner has re-introduced the No Regulation Without Representation Act (2017 H.R. 2887) on June 12, 2017, codifying physical presence nexus. Representative Goodlatte is a co-sponsor. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law Committee, has scheduled a hearing on H.R. 2887 for July 25, 2017. Neither of the other two pending bills have hearings scheduled. Ryan Prete, "Digital Sales Tax Bill Set For House Subcommittee Hearing," Bloomberg BNA Daily Tax Report (7/19/2017).